THE ORIGINAL AND DERIVED FEATURES OF THE CONSTITUTION.

I.

NOT many months ago the hundredth anniversary of the inauguration of our present constitutional form of government was celebrated in the city of New York. To realize fully the significance of this event, one should consider not only how many years must still elapse before it will be permitted to any one of the states of Europe to solemnize the corresponding event in its national history, but also that this government, established in 1789, has outlived a century of change in social life and political institutions without precedent in the history of the world.

The question lies near, how was it possible for a body of men, living in a rude, undeveloped land beyond the sea, two years before that first great scene at Versailles in a new act of the world's drama, to draw up a scheme of government fitted almost without modification for a nation which now stands among the foremost of the earth? Fully to answer this inquiry would be to write the social and constitutional history of the United States, not only since, but previous to 1789. For the success of a form of government is not determined by its approach to any abstract ideal, but by its adaptation to a specific nation and time. No simple contemplation of the ideas which find expression in a written constitution will enable one to prophesy its success or failure. "Une maison ne doit pas être construite pour l'architecte, ni pour elle même mais pour le propriétaire qui va s'y logir." It is this truth, so amply demonstrated by history, which renders constitution-making so difficult. "Un peuple consulté peut à la rigeur dire la forme de gouvernement qui lui plait, mais non

celle dont il a besoin; il ne le saura qu'à l'usage, il lui faut du temps pour verifier si sa maison politique est commode, solide, capable de résister aux intempéries, appropriée à ses moeurs, à ses occupations, à son caractère, à ses singularités, à ses brusqueries."[1] After even the most cursory review of the experience of Europe since 1789, the question must again present itself, how was it possible for the framers of the United States Constitution to produce anything which even under the most favorable circumstances could serve its end for so long a period? Did they, left without guide or precedent, by a simple effort of the intellect, draw up a form of government hitherto unknown, adapted to a future state of society then unforeseen? Or did they rely on the experience of others, and find in the history of government, from the formation of the Amphictyonic League to that of the Dutch Republic, materials for the new structure, rudely shaped blocks destined but too surely, like the Egyptian obelisk in Central Park, to disintegrate in their unnatural surroundings?

This inquiry has, strangely enough, received little or no attention from American authors, while such English writers as have touched on the subject appear to have done so with an insufficient knowledge of the real conditions of the problem. The Americans have, in general, accepted without much question the first theory; the English representative writers, the second and less exalted view. Each of these views lacks, however, a solid basis of thorough investigation, and in their extreme forms both are *a priori* alike improbable, as a consideration of the circumstances in which the Federal Convention of 1787 was placed, of the character of its task and the manner in which it did its work, will clearly show.

The government under the Articles of Confederation had proved so weak that by 1787 the American people were left as "thirteen distinct communities under no effective superintending control."[2] The condition of the

[1] Taine, "Ancien Regime," II.
[2] Randolph's Letter, Elliot, I, 484.

country was one in which no indication of "national disorder, poverty or insignificance"[1] was wanting. To substitute for the decayed fabric of the Confederation a central power sufficient to cope with the existing evils was thus the task of the Convention. But hardly had the delegates assembled before the extreme difficulty of this undertaking became apparent. Bitter dissensions arose, which threatened again and again to break up the assembly. There were the representatives of large states and small states, each class with a set of political theories corresponding to their different positions. There was a cross division due to the slaveholding interests of the South. To these were added the inevitable opposition of ideas and idiosyncrasies incident to the deliberations of a company of more or less learned and able men. To those blinded by a narrow particularism, even the most innocent and salutary provisions, such as the definition of treason and the prohibition of *ex post facto* laws,[2] appeared engines of tyranny. That, under the circumstances, the Convention "must have been compelled to sacrifice theoretical propriety to the force of extraneous consideration"[3] is too obvious to need further demonstration. I may be excused for quoting once more a passage from Hume, in which, as if foreseeing the constitution-making epoch which was soon to begin, he asserts with remarkable force the impossibility of establishing a government on abstract principles. "To balance a large state or society, whether monarchical or republican, on general laws, is a work of so great difficulty that no human genius, however comprehensive, is able, by mere dint of reason and reflection, to effect it. The judgments of many must unite in this work: Experience must guide their labor. Time must bring it to perfection. And the feeling of inconveniencies must correct the mistakes which they inevitably fall into in their first trials and experiments."[4]

[1] Hamilton, *Federalist*, No. 15.
[2] Martin's Letter, Elliot, I, 382, and Mason, I, 496.
[3] Madison, *Fed.*, No. 37.
[4] "Rise of the Arts and Sciences," Essays I, 122 (1772).

Sir Henry Maine, comparing our Constitution with European governments, and especially with that of England under George III, finds some striking analogies, and, neglecting to take into consideration the constitutional development on this side of the Atlantic previous to 1787, and forgetting apparently that "no amount of analogy between two systems can by itself prove the actual derivation of the one from the other,"[1] concludes that these analogies indicate imitation. Had he attended to the spirit of the time, or followed the process of formation of the Constitution, which I find no reason to infer that he has done,[2] he must have modified his view. Imitation is due either to a strong partiality for the past, or to indolence, neither of which was characteristic of the members of the Convention. They were earnest, intelligent men, fully conscious of the peculiarity of their position[3] and the importance of their task. Some among them even anticipated with prophetic insight the influence of their success or failure on the future of the governments of Europe. To the past, except of their own country, they were, as the very fact of their having crossed the ocean implies, not bound by any strong ties. The stirring times through which the country had lately passed could not fail to impress the men of the period with the importance of their own land. The bitterness of the late conflict was still too strongly felt to permit them to look with much love on the English form of rule. Although one of the members of the Convention complains that they were "eternally troubled with arguments and precedents

[1] "A strong current of similar events will produce coincidences in the history of nations whose whole institutions are distinct; much more will like circumstances force similarly constituted nations into like expedients; nay, great legislators will think together even if the events that suggest the thought be of the most dissimilar character. No amount of analogy between two systems can by itself prove the actual derivation of the one from the other." Stubbs, Const. Hist., 4th Ed., Vol. I, p. 226.

[2] One proof beside the negative evidence of absence of reference to so important an authority as Elliot's Debates and a reliance on the *Federalist* alone, is to be found in the fact that Maine thinks it "very remarkable that the mode of choosing the senate finally adopted did not commend itself to some of the stronger minds employed on the construction of the Federal Constitution." (Pop. Govt., p. 227.) All astonishment would have been quickly dispelled by "The Madison Papers."

[3] Elliot, II, 200. Also Elliot, II, 422; II. 19; II, 176; IV, 331.

from the British Government,"[1] the very fact that the opponents of the proposed Constitution hoped, by pointing out analogies to the English system, to prejudice the people against it and cause its rejection, is of itself a proof of the attitude of opposition to British institutions. Of the laws and customs of other lands, the majority of the Convention cannot be supposed to have made a careful study.[2] But it was not a want of knowledge, so much as the conviction on the part of the leading men of the general inapplicability of European precedents which led to their rejection.[3] With the exception of the warning they furnished of the evils of a loose union, the previous and then existing confederacies cannot be said to have exercised the least influence on the formation of the American Constitution.

Far more important than their knowledge of the history of other countries, was their home experience. It is in a consideration of this that the key to the problem of the original and derived features of the Constitution is to be found. The Americans already regarded themselves as a new nation, a separate people "differing from all others,"[4] and it was with a due regard for what was peculiar in their situation, their habits, opinions and resources, that the Federal Constitution was to be formed.

The constitutional development of the American colonies began very early. The colonial system hampered them but slightly, and that chiefly in regard to trade. "Assemblies were not instituted, but grew up of themselves, because it was the nature of Englishmen to assemble,"[5] as Hutchin-

[1] Luther Martin, El., I, 367.

[2] For the *personnel* of the Convention see Brancroft, Hist. of the Const., II, 9. Mr. Freeman's statement that "it is clear that Hamilton and Madison knew hardly anything more of Grecian history than what they picked up from the 'Observations' of the Abbé Mably" (Hist. Fed. Govt., p. 319), is fully refuted by the number of authorities quoted by Madison in his careful outline of preceding Confederacies. Works, N. Y., 1889, I, 293.

[3] Elliot, IV, 319; II, 422. Madison, El., III, 129, but also *Fed.*, No. 63. Mr. Randal observed "quoting of ancient history was no more to the purpose than to tell how our forefathers dug clams at Plymouth." El., II, 69.

[4] Charles Pinckney, El., IV, 320.

[5] Seeley, "Expansion of England," p. 67.

son expresses it "This year (1619) a House of Burgesses *broke out* in Virginia." Long previous to the Revolution the jealousy of the mother country had been repeatedly aroused by the independent demeanor of the colonists. So completely were the colonies left to themselves that some of them were for most purposes independent states. Good use had been made of this freedom as the success with which the states provided constitutions for themselves on the recommendation of Congress (1775) clearly shows. Although there is a unity running through the diversities of these thirteen forms of government, each indicates originality and expresses, in a way, the particular views of the individual state. The unity consists in certain fundamental concepts, the outcome of the constitutional development of the colonies and states. These generally accepted notions naturally imposed limitations on the Convention by defining, broadly, what the plan submitted to the states must be, to receive the assent of the people. "As the particular state governments are relative to the manners and genius of the inhabitants of each state, so ought the general government to be an assemblage of the principles of all the governments; for, without this assemblage of the principles, the general government will not sufficiently apply to the genius of the people confederated." [1] It was from this practical standpoint that the members of the Convention looked at the task before them. The dissimilarity [2] in these constitutions occasioned some diversity of opinion, but there was enough that was common to them all to furnish a basis of compromise and concession. The fact that the state organization was unitary did not preclude its application to the Federal government, as will appear later.

The constitutions of the states were in many respects the direct descendants of the colonial charters. In the

[1] Bowdoin. El., II, 126. The State constitutions constantly furnished the basis of argument. El., II, 365-6; III, 18, etc. *Federalist, passim.*

[2] Madison. El., III, 93.

case of Connecticut, a proclamation to the effect that the people had ascended the throne of the deposed king, was was all that was deemed necessary to change a charter into a constitution.[1] The several agreements in England for better securing the rights and liberties of the subjects, were the models for the "Bill of Rights," as distinguished in some state constitutions from the "Frame of Government." The more farsighted saw this distinction to be illusory, and justly observed that the constitution was itself a "Bill of Rights."[2] The conception of a written constitution, however, as a peculiarly solemn and permanent law, determining the organization of the government and limiting the ordinary legislation, was not taken from England, for a constitution in this sense has never existed there. Most of the states had already distinguished their constitutions from ordinary laws, by prescribing certain restrictions in the case of Amendments. These were either to be framed by conventions, or must, in order to become law, receive a greater proportion of the votes in the legislative bodies than ordinary provisions.[3]

But the members of the Convention had of necessity to overstep the bounds of the Past, and proceed into a region of political science where the states, as unitary governments, had had no call to go. The new government must consider not only individuals, but individuals already

[1] "Be it enacted and declared by the Governor and Council, and House of Representatives, in the General Court assembled, That the ancient Form of Civil Government contained in the Charters from *Charles* the Second, *King* of *England*, and adopted by the People of this State, shall be and remain the Civil Constitution of this State, under the sole authority of the People thereof, independent of any King or Prince whatever" (Poore's Collection, 257). New Jersey continued to speak of the Constitution as the *Charter*.

[2] Hamilton, *Fed.*, 89. Also El., III, 191 and IV, 148.

[3] By the charter of Delaware (1701) the consent of the governor and six-sevenths of the Assembly was necessary; by the constitution of Delaware, five-sevenths of the Assembly and seven members of the Legislature; by the charter of Pennsylvania, six-sevenths of the members and the Governor. In Georgia (1777), on petitions from a majority of the counties, the Assembly was to order a convention to be called for the purpose of amendment, specifying the alteration to be made, according to the petitions. In Maryland, amendments were to be passed by two legislatures. Pennsylvania, Massachusetts and New Hampshire provided for calling a convention. New York, New Jersey and North Carolina seem to have neglected to provide for this contingency.

organized into states. In this respect they realized, concretely, for the first time, the conception of a *Federation* (or Bundesstaat), as distinguished from the loose union of the *Confederation* (a Staatenbund). This characteristic of the Constitution has exercised no slight influence on modern federations, and is by far the most significant of its original features.[1] Nor did this escape the members themselves. "I know not," said Lansing in the New York convention, "that history furnishes an example of a confederated republic coercing the states composing it by the mild influence of laws operating on the individuals of those states." [2] In this they departed most distinctly from the principles of the Articles of Confederation, "the great and radical vice" of which was the "principle of *legislation* for *States* and *Governments* in their *corporate* and *collective capacities*, and as contradistinguished from the *individuals* of whom they consist." [3] In many other ways, however, the previous Confederation furnished precedents for important clauses in the new Constitution, as will appear as we proceed to a consideration of the organization of the government in detail.[4]

[1] "Wenn auch einzelne Untersuchungen über zusammengesetzte Staatswesen in Deutschland zur Reichszeit vorkommen, so hat doch die nordamerikanische Verfassung die erste Veranlassung zur scharfen Gegenüberstellung der beiden Formen von Bundesverhältnissen gegeben. . . . . Diese Ansichten [of the *Federalist* Nos. 15 and 16] sind später von Tocqueville la democratie en Amerique, livre 1, chap. 8, weiter ausgeführt worden und haben durch ihn auch auf die Entwickelung der deutschen Theorie einen maasgebenden Einfluss ausgeübt."—Meyer, Deutsches Staatsrecht, p. 29. "Der Bundesstaat ist der neue Staatsgedanke, welcher zuerst durch die nordamerikanische Verfassung von 1789, in die Welt getreten ist."—Schulze, Deutsches Staatsrecht, I, 46. "But if their notions were conceptions derived from English law, the great statesmen of America gave to old ideas a perfectly new expansion, and for the first time in the history of the world formed a Constitution which should in strictness be the "law of the land," and in so doing created modern federalism. For the essential characteristics of federalism, the supremacy of the Constitution, the distribution of powers, the authority of the judiciary, reappear, though no doubt with modifications in every true federal state." Dicey, Law of the Constitution, p. 152.

[2] El., II, 219; also El., II, 55; II, 214, and *Fed.*, No. 15.

[3] Hamilton, *Federalist*, No. 15. Also El., II, 214.

[4] "Truth is, that the great principles of the Constitution proposed by the Convention, may be considered less, as absolutely new than as the expression of the principles which are found in the Articles of Confederation. The misfortune under the latter system has been that these principles are so feeble and confined as to justify all the charges of inefficiency which have been urged against it; and to require a degree of enlargement which gives the new system the aspect of an entire transformation of the old." Madison, *Fed.*, 40 and 45.

II.

"All legislative powers, herein granted, shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[1] That the precedent of the English Parliament exercised a determining influence on the form of the American Congress is a most natural inference. Although we may not say, with Mr. Freeman, that the United States Constitution may be proved to be distinctly English by the single circumstance that the legislative body consists of two houses, instead of one, or three, or more, it must be admitted that the bi-cameral system is by no means so inevitable as would at first sight appear. There was nothing in the state of society in this country at the time of forming the Constitution to make the choice of just two houses a natural one. There was no existing division of the people on which to base such a system, neither nobles, nor clergy, nor burgesses separated from the common people by distinct traditions and widely divergent interests. The fact of the division of the English Parliament into two branches is, in a certain way, accidental; four would seem to have been a more natural number; nobles, clergy, burgesses and knights of the shire. In France, three distinct interests and classes were recognized;[2] in Sweden, four.[3] In spite of these considerations, when the resolution "that the national legislature ought to

[1] U. S. Constitution, Art. I, Sec. 1. "The department of legislation shall be formed by two branches, a *Senate*, and House of Representatives." Constitution of Massachusetts, 1780. " . . . . the supreme legislative power, within this State, shall be vested in two separate and distinct bodies of men; the one to be called the Assembly of the State of New York; the other to be called the Senate of the State of New York." Constitution of New York, 1777. "That the legislature consist of two distinct branches, a senate, and a house of delegates. . . . . " Constitution of Maryland, 1776. "That the legislative authority shall be vested in two distinct branches, both dependent on the people, *to wit*, a *Senate*, and *House of Commons*." Constitution of North Carolina, 1776. "That the legislative authority be vested in a general assembly, to consist of two distinct bodies, a senate and house of representatives." Constitution of South Carolina, 1778. "The legislature shall be formed of two distinct branches." Constitution of Virginia, 1776.

[2] See De Lavergne, "Assemblées provinciales," pp. 28 and 35.

[3] See Maine "Popular Government," p. 225.

consist of two branches" first came before the Convention, it was agreed to without debate or dissent, except that of Pennsylvania.[1] As the necessity of a compromise between the large and small states had not yet become apparent, it cannot be supposed to have had any influence on the early decision in favor of a legislative body of two chambers. Was the choice of the Convention then attributable to their admiration of the English Parliament? Not solely, certainly. There were, in 1787, no less than eleven practically independent communities within 500 miles of Philadelphia, which had accepted the bi-cameral system of legislating. It had been known on this side of the Atlantic for more than a century, and was a simple and natural development of the colonial governments.[2] The negative influence of the existing government is also apparent, for the committee which framed the Articles of Confederation, misled, as Mr. Bancroft observes, partly by rooted distrust for which the motive had ceased, and partly by erudition, which studied Hellenic councils and leagues, as well as later confederacies, provided for a legislature with one house.[3] In this respect, as well as in almost every feature of the adopted plan, the Convention departed from the models furnished by preceding confederacies.[4]

[1] This state, confident, no doubt, in the result, and "probably from complaisance to Dr. Franklin, who was understood to be partial to a single house of legislation, cast its vote in the negative." Elliott, V, 135. Later in the Convention, during the discussion of the more conservative scheme of reform known as the "New Jersey Plan," there were some who advocated the adherence to the system of the Confederation with a congress of a single chamber. The Convention refused to consider this plan by a vote of 6 to 4 (Maryland divided). El., V, 220. Adams was a confessed opponent of two houses. El., I, 359 and f.

[2] See Frothingham, "Rise of the Republic," p. 19, note, for an excellent summary of this process. The separation into two houses took place in Massachusetts, 1644; in Connecticut, 1698, but as early as 1639 it was ordered that the deputies "shall have power and liberty to appoynt a tyme and a place of meeting together before any Generall Courte to advise and consult of all such things as may concerne the good of the publike" (Poore's Collection, p. 251). In New Jersey, 1738, the council was made a separate branch; the Governor withdrew, and was no longer presiding officer. In New Hampshire the separation took place in 1692. In Virginia in 1680, "Lord Colepepper, taking advantage of some dispute among them, procured the Council to sit apart from the Assembly, so they became two distinct houses" (Beverly, History of Virginia, quoted by Frothingham.)

[3] Bancroft, History of the Constitution, I, 11.

[4] Elliot, V, 218-219.

In view of the democratic theories which largely prevailed in the states, it is not surprising that a proportional representation was established for the lower house. This is also a distinct departure from the constitutions of previous confederacies,[1] with the doubtful exception of the Lykian League. In its case there was, however, no representation, properly so called. The votes of the several cities were effectual in proportion roughly to their pecuniary contributions [2]—a mode of appointment which, although prevailing in some of the states, was, for good reasons, rejected by the Convention. This, then, is an original feature of our system viewed as a *federal* government. But in this respect our Constitution is national, and resembles that of England in theory,[3] while it is practically a copy of the state governments, in which the counties were represented in proportion to their inhabitants. The constitution of New York is a particularly striking precedent, in that it provided for the readjustment of the representation after a periodic *census*.

The qualifications of the electors of the representatives are to be those of the most numerous branch of the state legislature. This clause owes its place in the Constitution to the fact that the members could not agree on what limitations to the suffrage would be expedient. It was difficult to form any uniform rule of qualifications for all the states, and unnecessary innovations were in this way avoided.[4] This is in close analogy with the English system, where the right of election in boroughs was various, depending on the several charters, customs and constitutions of the respective places.[5]

The term of the Representatives is much shorter than

[1] El., I, 77.

[2] Letters and other Writings of James Madison. N. Y., 1884, 1, 293. Also, Freeman, Hist. of Fed. Gov't., 1, 208 *et seq.*

[3] See Blackstone's Commentaries, 1, 170 and 1, 171; also, 1. 174, and Locke on Government, C. 13.

[4] See El., V, 385 *et seq.*

[5] Blackstone's Comm., 1, 174. By the statute 3 Geo. III, C. 15, Parliament altered the law in this respect, as did the people of the United States by the XV Amendment.

the maximum length of an English Parliament. In all the states but South Carolina the members of the lower branch were, in 1787, chosen annually.[1] The delegates wished to avoid, on the one hand, too great frequency of elections, which "rendered the people indifferent to them, and made the best men unwilling to engage in so precarious a service."[2] On the other hand, too long a term might make the popular branch independent of their constituents. Many favored annual elections, while some of the best men desired three years, or even more. Two years was agreed upon as a compromise.

The qualification of residence, extending to the state only, which is demanded in both the case of the Senators and Representatives, was, no doubt, to insure, in those chosen, a permanent interest in and attachment to the state which they represented, as well as a familiarity with its needs. A residence qualification was common enough in the states, but in England it had, shortly before, been abolished by statute.[3]

"The Senate of the United States shall be composed of two Senators from each state chosen by the legislature thereof for six years, and each Senator shall have one vote."[4] The history of this clause, on which we need not enter here, is co-terminal with the period of the Convention. On May 30th, the day on which the consideration of a form of government began, the delegates from Delaware threatened secession from the Convention in case any change in the rule of equal suffrage, established by the Articles of Confederation, should be fixed on.[5] September 16th the Constitution was finally completed. The last touch was to add the proviso "that no state, without its

[1] "Prior to the Revolution, the representatives in the several colonies were elected for different periods—for three years, for seven years, etc."—Hamilton. El., II. 305.

[2] El., V, 183.

[3] " . . . . . in strictness, all members ought to have been inhabitants of the places from which they are chosen; but this, having been long disregarded, was at length entirely repealed by statute 14, Geo. III, C. 58.—Blackstone's Comm., 1, 175.

[4] U. S. Cons., Art. I, Sec. 3.

[5] El. V, 134.

consent, shall be deprived of its equal suffrage in the Senate."[1]

On examining the organization of the Senate in its final form, it is observable that it is (I) a comparatively small body; (II) the members are chosen by the legislatures of the several states; (III) each state has, in respect to votes, the same weight, and (IV) the term of the Senators is comparatively long, and their seats are vacated in rotation.

I. The size of our upper house was, beyond a doubt, carefully and advisedly limited by the Convention. Randolph expressed himself anxious to have the second branch much less numerous than the first, "so small as to be exempt from the passionate proceedings to which numerous assemblies are liable." He observed that "the general object was to provide a cure for the evils under which the United States labored; that in tracing these evils to their origin, every man had found it in the turbulence and follies of democracy; that some check, therefore, was to be sought for against this tendency of our government, and that a good Senate seemed most likely to answer the purpose."[2] Madison said: "The use of the Senate is to consist in its proceeding with more coolness, with more system, and with more wisdom than the popular branch. . . . . When the weight of a set of men depends merely on their personal characters, the greater the number, the greater the weight. When it depends on the degree of political authority lodged in them, the smaller the number, the greater the weight."[3] Dickinson, however, having the House of Lords[4] in mind as a model, declared that the greatness of the number was no objection to him.[5] This seems not to have been the general sentiment. Whether the small second

[1] This motion, being dictated by the circulating murmurs of the small states, was agreed to without debate. El., V, 552.

[2] El., V, 138.

[3] El., V, 167.

[4] The House of Lords, on the accession of George III, had 224 members. Constitutional Year Book.

[5] El., V, 163 and 166.

chambers of Rhode Island, Delaware, Maryland and New Jersey[1] had any influence on the formation of the Senate is only hypothetical.[2] Certainly the experience through which Rhode Island was passing at the time of the Convention was not of a character to invite imitation of its institutions.

II. In considering the mode of electing the Senators, the question naturally presents itself were they regarded as representatives of the *state governments*, or as representatives of the *people of the states*, chosen by an election of the second degree? The absence of a means of enforcing observance of the instructions of the legislatures by recall, as in the Articles of Confederation, and the fact that the Senators are not prevented from cancelling the state's influence by opposing votes, are strong arguments for the second hypothesis.[3] The members of the Convention seem not to have allowed the question to trouble them. As Lansing said: "This distinction is properly noticed when it is convenient and useful to the gentlemen's argument; but when it stands in their way it is easily passed by and disregarded."[4] Most of them, like Dickinson, considered "this combination of the state governments with the national government as politic as it was unavoidable," as the justifications of the arrangement clearly show. Sherman hoped that the "particular states would thus become interested in supporting the national government, and that a due harmony between the two governments would be maintained."[5] "Whatever power," said Mason, "may be necessary for the national government, a certain portion must necessarily be left with the states. It is impossible for one power to pervade the extreme parts of

[1] Governor or deputy governor and ten assistants formed the second house in Rhode Island; that of New Jersey consisted of twenty-one; the legislative council of Delaware of nine; Maryland had fifteen senators.

[2] *Federalist*, No. 63.

[3] Cooley, Prin. of Cons. Law, pp. 41-42; Livingston, El., II, 291; von Holst, Staatsrecht, S. 23.

[4] El. I, 294, also El. II, 311.

[5] Elliot, V, 166.

the United States so as to carry equal justice to them. The state legislatures also ought to have some means of defending themselves against encroachments of the national government. In every other department we have studiously endeavored to provide for its self-defense. Shall we leave the states alone unprovided with the means for this purpose? And what better means can we provide than the giving them some share in, or rather to make them a consistent part of the national establishment?"[1] Dickinson advocated an election by the state legislatures for two reasons: "First, because the sense of the states would be better collected through their government than immediately from the people at large; secondly, because he wished the Senate to consist of the most distinguished characters . . . . and he thought such characters more likely to be selected by the state legislatures than in any other mode."[2]

III. The equality of the members of the Union in the Senate is, as we have seen, in imitation, as far as it goes, of preceding confederacies, and need not be further dwelt upon.

IV. The constitution of Maryland furnished avowedly[3] the suggestion, among others, of a long term for the members of the Senate, as a means by which the stability of that body might be increased. The term in that state was five years. The principle of rotation as it appears in our Senate, by which a kind of continuity and steadiness looking towards the advantages of an hereditary chamber is affected, was no new thing. It is found in the state governments of the time,[4] and earlier was extolled by

[1] Elliot, V, 170; see also Hamilton, El., II, 301–2.

[2] Elliot, V, 166.

[3] Elliot, V, 426, and V, 186.

[4] Franklin's plan of government provided that the members of the executive council should go out in rotation. See Secret Journal of Congress, I, 286. The members of the upper houses in New York, Virginia and Delaware were elected on this plan.

Harrington as exemplified in the constitution of the Venetian republic.[1]

Nothing better illustrates the freedom with which the delegates drew upon the existing institutions of the states in forming the new Federal Constitution than the similarity between the form of the legislature in Maryland and that established by the Convention. The counties stood to the state in respect to representation, in much the same relation as the states to the federation. Each county in Maryland was to send four members, *elected directly by the people*, to the lower house. (In the point of equal suffrage in the lower house the analogy to the Congress of the Union, of course, fails. Other of the states, however, provided for *proportional* representation of the counties in the lower branch, and in New York, as we have seen, for a periodic adjustment.) The senate of Maryland was a much *smaller* body than the lower house, and the members were elected for a *long term* in a manner closely resembling the election of United States Senators by the legislatures of the several states, and still more closely the method of electing the President. Each county chose two members of an electoral college, which was to meet at the seat of government, and in their turn select the senators.

Although no preceding confederacy had furnished the model of a legislative assembly of two chambers, the word *senate* was a venerable one. We have, however, discovered too many similarities between our Senate and the then existing institutions to suppose that the older ones exercised any influence on its formation. There is,

[1] "Wherefore, your Parliaments are not henceforth to come out of the bag of Æolus, but by your Galaxys to be perpetual food of the fire of Vesta. Your Galaxys, which divide the House into so many Regions are three; one of which constituting the third Region, is annually chosen, but for the term of three years, which causes the House (having at once Blossoms, Fruit half ripe, and others dropping off in full maturity) to resemble an orange tree such as is at the same time Education, or Spring, and a Harvest too. . . . . thus the Vicissitudes of your Senators is not perceivable in the steadiness and perpetuity of your Senate which like that of Venice being always changing is forever the same." Harrington's Wks., London, 1747, p. 140.

moreover, a fundamental difference between the modern second chambers—"supposed counterparts of the English House of Lords,"—and the ancient senates—a difference which Sir Henry Maine no doubt understood much better than the delegates, but which is none the less interesting. The older institutions "in their primitive condition, at all events, decided beforehand what measures should be submitted to the Popular Assembly, and if they legislated themselves, their enactments had reference to special departments of state, such as religion and finance. On the whole, they were rather administrative than legislative bodies. The nearest analogy to the very important control over the law-making power which they once possessed, must be sought in the indefinite but most real and effective authority which an English Cabinet enjoys through its virtual monopoly of the initiative in legislation."[1] In spite of Gouverneur Morris' assertion that the Senate was "another Congress, a mere wisp of straw,"[2] the success of the Convention in forming a body both of authority and dignity is now very generally recognized both at home and abroad.

In the matter of the powers and duties of the respective houses in relation to impeachments, the constitution of Massachusetts, with a suggestion from that of New York, furnished the pattern which the delegates copied. The former provides that "The senate shall be a court, with full authority to hear and determine all impeachments made by the house of representatives, against any officer or officers of the commonwealth, for misconduct and maladministration in their offices. But previous to the trial of every impeachment, the members of the senate shall respectively be sworn, truly and impartially to determine the charge in question, according to evidence. This judgment, however, shall not extend further than to removal from office and disqualification to hold or enjoy any place

[1] Maine, Early Law and Custom, p. 25.
[2] Elliot, V, 286.

of honor, trust or profit under this commonwealth. But the party so convicted shall be, nevertheless, liable to indictment, trial, judgment and punishment according to the laws of the land."[1] The constitution of New York (1777) required a vote of two-thirds of the members present to convict.[2] Back of these was, of course, the English precedent of "the solemn accusation of any individual by the commons at the bar of the lords."[3]

The restriction of the proposal of revenue bills to the lower house[4] was long and earnestly canvassed in the Convention. The experience of the states—where the restriction, in one form and another, was common—furnished striking examples of the evil results of the system, which induced many of the best men to oppose its introduction into the new Constitution. Although it is usually classed as an element of one of the three great compromises, it was, with wise foresight, declared by some to be, in reality, no concession by the smaller states. During the discussion a member who entertained this view called attention to the fact that the restriction as to money bills had been rejected, on its own merits, by eight states against three, and that the very states which now declared it a concession were then against it as nugatory or improper in itself.[5] It is noticeable that the smaller states magnanimously voted for inserting the restriction.[6] The clause limiting appropriations for the army to two years bears an obvious analogy to the custom in England.[7]

The powers of Congress are, with the addition of that of regulating commerce, in general those granted to the

[1] Cons. of 1780, Pt. II, Ch. I, § II, Art. VIII. N. H. copied this in the Cons. of 1789.

[2] Art. 33.

[3] See Rowland's Manual of the Eng. Cons., p. 457. Hallam's Cons. Hist., I, 487 *et seq.*, I, 508.

[4] See Blackstone's Comm., I, 169.

[5] El., V, 284. For the results of this provision, see Boutmy, Le droit constitutionel.

[6] El., V, 285.

[7] *Federalist*, No. 61.

central power by the Articles of Confederation, with the all-important difference that Congress operates directly on the individual instead of through tardy and indifferent states.[1]

III.

From the first there was no question that the new Constitution should provide for a distinct and clearly differentiated Executive.[2] The absence of such an enforcing power in the central government, under the Articles of Confederation, was a most notorious defect, and the recognition of this would alone have made it one of the first objects of the Convention to remedy the deficiency. But there was also a theoretic reason. The delegates were filled with the idea of the separation of powers, regarding that as the true and necessary foundation of any system of free government. The states even went so far in their enthusiasm for this principle as to embody it in their Bill of Rights, thus classing it with the most sacred rights of humanity.[3] Without a carefully defined executive, the separation of the three branches of government could, obviously, not take place.[4]

When the subject was first considered in the Convention, Wilson moved that a "national executive, to consist of a single person, be instituted."[5] But in so doing, he was not, he expressly said, "governed by the British model, which was inapplicable to the situation of this country."[6]

[1] "If the new Constitution be examined with accuracy and candor, it will be found that the changes which it proposes consist much less in the adoption of NEW POWERS to the Union, than in the inauguration of its ORIGINAL POWERS." Madison, *Fed.*, No. 45.

[2] The only protest in the convention came from Sherman, of Connecticut, who held that the executive, being an institution solely for the purpose of carrying out the will of the legislature, should consist of such persons, responsible to it alone, as it should from time to time appoint. El., V, 140.

[3] Mass., Art. XXX (1780); Md., Art. VI (1776); N. C., Art. IV (1776); N. H., Art. XXXVII (1784); Va., Sec. 5 (1776).

[4] The Greek federations in general, the Swiss, the Dutch and our own had been without separate executive branches.

[5] El., V, 140.

[6] El., V, 141.

"He preferred a single magistrate, as giving most energy, dispatch and responsibility to the office."[1] Later, in answer, probably, to those who saw in the single executive too close an approximation to the king of England, he urged that "all the thirteen states, though agreeing in scarcely any other instance, agree in placing a single magistrate at the head of the government."[2] The fear was expressed that the people also would immediately see the resemblance between a single executive and a king, a person then in little favor, and that such a feature might cause a summary rejection of the whole proposed plan of union. The careful attempt in the *Federalist*[3] to prove that no very close analogy did in reality exist, shows that the fear was not without foundation. Nevertheless, in spite of this and other objections, the question whether or not the executive power should be entrusted to a single person, was, after one postponement, settled in the affirmative by a vote of seven to three. The question was never again seriously reopened.

The unanimity on this important point is very striking, in view of the prolonged discussion of many comparatively unimportant clauses. The reason for this exceptionally speedy agreement is to be found partly in the obvious inconveniences of a plural executive, the evil results of which had so palpably shown themselves in the history of Holland.[4] A more efficient cause, however, than the experience of European states is to be found in the familiarity of the members with the single executive, not so much of England as of the colonies, and more particularly of the states. It was this experience at home which had demonstrated the safeness, if not the advantage, of a single head of the government, and this familiarity prevented most of those members, prone to foresee the evil of every proposed

[1] El., V, 141.
[2] El., V, 150.
[3] Nos. 67 and 69.
[4] The experience of Holland, which was cited in the convention, probably had its influence in preventing the adoption of a similar expedient in our case.

measure for strengthening the central power, from detecting in this one what Randolph, its prime opponent, called a "fœtus of monarchy." Had this feature been taken from the British constitution, instead of being the result of experience at home, there would have been a struggle in the Convention between the few members who, like Hamilton, thought the British constitution the best, and Dickinson, who thought a limited monarchy one of the best governments in the world,[1] and the great majority of less influential men, who dreaded any approach to a form of rule from which they had suffered so much. The acceptance of the Constitution by the people whose "permanent temper" was "adverse to the very semblance of monarchy,"[2] would also tend to show that there is here no *direct* imitation of an English king. The remark of Hamilton on this point indicates clearly enough the impossibility of selecting any one system which served in this particular as a model for our Constitution. "The first thing which strikes our attention," he writes, in regard to the President, "is that the executive authority, with few exceptions, is to be vested in a single magistrate. This will scarcely, however, be considered as a point upon which any comparison can be grounded; for if, in this particular, there be a resemblance to the King of Great Britain, there is not less a resemblance to the Grand Seignor, to the Khan of Tartary, to the Man of the Seven Mountains or the Governor of New York."[3]

Besides the expedient of creating an executive of two or more co-equal members, there was another way in which the Convention might have avoided placing the whole executive power in the hands of a single person, that of associating with the President the council so commonly provided by the state constitutions. The delegates made the distinction recognized by the constitutions of two of the

[1] Elliot, V, 148.
[2] Elliot, V, 149.
[3] The *Federalist*, No. 69.

states at least,[1] between a council of *revision*, such as was proposed in the "Virginia Plan,"[2] and the more common *executive* council, which had no relation to the law-making. Before the vote determining on a single executive was taken, Sherman had observed, as an offset to Wilson's argument, that the states had, in every case, chosen to put a single magistrate at the head of affairs, "that in all the states there was a council of advice, without which the first magistrate could not act. . . . Even in Great Britain the king has a council."[3] Just before the motion that the executive power should be vested in a single person, which Wilson had seconded, was put, he was asked if he meant to annex a council. He replied that he meant "to have no council which oftener serves to cover than prevent malpractices."[4] The vote, then, on June 4th, was probably understood to exclude from the plan any efficient as distinguished from a merely advisory council for the President, and in fact, little more was said on the subject. The matter was last mentioned in the debates September 7th, when a slight discussion took place, Mason remarking that "in rejecting a council to the President we are about to try an experiment on which the most despotic government has never ventured; the Grand Seignor himself has his Divan."[5] The final draft provided simply that the President "may require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices."[6] It is difficult to see why an expedient for limititing the power of the executive, so common among the states, should have been passed by with so little discussion.

[1] In Mass. (cons. 1780), there was "a council for advising the governor in the executive part of the government" (Pt. II, Ch. II, Sec. III, Art. I). In New York the council of senators had to do with appointments only, and the council of revision with the acts of the legislature only; the governor being in other respects "the supreme executive power" (Cons. 1777, Art. 3 and 23). In New Jersey the resolutions of the council did not bind the governor. See *Federalist*, No. 70.

[2] Elliot, V, 128.

[3] Elliot, V, 150.

[4] Elliot, V, 151.

[5] Elliot, V, 525; also, I, 495.

[6] U. S. Cons., Art. II, § 2.

There is little to be learned on this subject from the debates in the Convention. Probably the following remark of Gouverneur Morris gives a clue to its action. Speaking of the committee report of September 4th, he says: "A council was considered in the committee, where it was judged that the President, by persuading his council to concur in his wrong measures, would acquire their protection for them."[1] The lonely position of our President is, as Mason's assertion above implies, a unique feature in the Constitution. The failure to establish an efficient council led the Convention to limit the President's power by giving the Senate control over some of his acts. The association of the Senate with the President in the exercise of the appointing power is strikingly similar to the system pursued in New York under the constitution of 1777. There the executive, free to act alone in all other respects, was bound to make appointments "by and with the consent of a select committee of the senate."[2]

After determining upon the unity of the executive, the Convention took up what proved to be an exceedingly knotty question—the manner of choice. Wilson said of it towards the close: "This subject has greatly divided the House, and will also divide the people out of doors. It is, in truth, the most difficult of all on which we have had to decide."[3] He was, from the first, in favor of an election by the people, finding successful precedents for this method in the cases of Massachusetts and New York,[4] where experience showed that an election of the first magistrate by the people at large was both a convenient and successful mode."[5] This suggestion met with little favor,

[1] Elliot, V, 525; also, Randolph. The councillors will either impede or clog the President. . . . they will also impair his responsibility. El., III, 195. See, also, El., IV, 108.

[2] N. Y. Cons. (1777), Art. XXIII. The governor's power of nomination seems, however, to have been somewhat equivocal.

[3] Elliot, V, 509.

[4] The Cons. of Conn. (1776), and of N. H. (1784), also provided for an election of the governor by the people.

[5] Elliot, V, 142.

and it was decided in committee of the whole to leave the choice of the President to the National Congress, as provided for in Randolph's resolutions. The chief objections urged against the plan of a direct election by the people were the probable difficulty of concentrating a sufficient number of votes on one candidate, the inability of the people to judge of the fitness of candidates, the possible dangerous influence of demagogues, the difficulty on this plan of giving to the slave states (a large per cent. of the inhabitants of which were non-voters), an equitable influence in the choice, and lastly, the tumultuousness and riot which history showed to be incident on popular elections. The difficulties were not, however, all on one side. Should the appointment be made by the national legislature there was "danger of intrigue and faction," and, when elected, the executive, it was thought, would feel himself dependent on the legislative body, especially if he were re-eligible. In fact, re-eligibility was held to be entirely incompatible with this manner of choice. Then, there was the difficulty of establishing a court of impeachment other than the Senate, which would obviously not be qualified for the trial, nor the other branch for the impeachment of a President chosen by them.[1] As we know, neither of these schemes of election was finally adopted, but it is interesting to trace the influence of the state constitutions in the ready adoption of election by the National Congress as a provisional plan. In no less than eight of the states[2] this mode of choice prevailed, and it is impossible to avoid the conclusion that the familiarity of the delegates with the working of the plan at home led to its adoption for the new Federal Constitution until other considerations induced them finally to reject it.

On reconsidering this question on July 17th, the plan for election by the people was negatived nine to one, and that by electors chosen by the state legislatures, eight to

[1] Elliot, V, 508.

[2] Pa. Cons., 1776; Md. Cons., 1776; Del. Cons., 1776; N. J. Cons., 1776; N. C. Cons., 1776; S. C. Cons., 1776 and '78; Ga. Cons., 1777; Va. Cons., 1776.

two, while the vote in favor of the appointment by Congress was unanimous. But, two days later, it was determined by a vote of eight to two,[1] that the national executive should be chosen by electors appointed by the several state legislatures. Five days after the delegates reverted to the old plan of election by the national legislature.[2] These sudden changes are not easily accounted for. The reports of the debates are not full enough to enable us to trace satisfactorily the reason for the strange fluctuations of sentiment observable in successive votes on the same question. This last change, however, was probably due to the fear that the electors would not be first-class men, and that this expedient of electoral colleges would serve to render the government needlessly complex.

On September 4th a special committee, to which the manner of electing the President had, among other things, been referred, reported a plan[3] which, after substituting the House of Representatives for the Senate in cases of undetermined elections, was finally adopted. It must be kept in mind that our Constitution does not provide that the presidential electors shall be chosen by the people, but only that "each state shall appoint in such manner as the legislature thereof shall direct" a certain number of electors. The selection of the electors is now, as a matter of fact, left to the people of the states, but it has not always been so. There was a considerable variety of policy during the first years of the Constitution; Massachusetts, Virginia, North Carolina and Kentucky chose electors in districts; Pennsylvania, New Hampshire and Maryland on a general ticket; while in New Jersey, South Carolina, Connecticut, Georgia and Delaware, the legislature assumed the right itself.[4] It is impossible to say whether the clause in our

[1] Elliot, V, 338.
[2] Elliot, V, 359.
[3] Elliot, V, 507.
[4] O'Neil, "The American Electoral System," p. 34. When Tennessee was first admitted to the Union, the legislature divided the State into three districts by an act which read as follows: "That the said electors may be elected with as little trouble to the citizens as possible, be it enacted that . . . are appointed electors to elect an elector for their respective district." Roulston's "Laws of Tenn.," Ed. 1803, p. 109. Ch. IV, of Acts, 1st Assembly. Quoted by Mr. O'Neil.

Constitution, which leaves it to the state legislatures to determine the manner of choosing the electors was a tacit compromise or not. We have no record of any objection to it raised in the Convention, and of the discussion in the committee which framed it we know nothing. The wording is almost identical with that clause in the Articles of Confederation which provides that delegates to Congress shall be annually "appointed in such manner as the legisture of each state shall direct."[1] Under this article the state legislatures, except in Connecticut and Rhode Island, chose the delegates.[2]

But the construction put upon this indefinite clause is not strictly within the scope of this paper; neither is the inefficiency of the electoral college as a deliberative body which, as the framers of the Constitution fondly expected, would act "under circumstances favorable to deliberation and to a judicious combination of all the reasons and inducements that were proper to govern their choice."[3] The fact that the election of the President is left to a body of men chosen "for the special purpose," and "at a particular conjuncture," is the striking characteristic of the system. Two European potentates, the German Emperor and the Pope, were at the time of the Convention elected by small bodies of men, in one case even called "electors" [*principes electores.* Ger. *Kurfürsten*]. Sir Henry Maine thinks that the members of the Convention "were to a considerable extent guided" by the example of the Holy Roman Empire. "The American Republican Electors," he goes so far as to say, "are the German Imperial Electors, except they are chosen by the several states."[4] A glance at this feature of the Impe-

[1] Art. V.

[2] *Federalist*, No. 40. Gen. Pinckney, on the occasion of moving that the first branch of the national legislature should be elected "in such manner as the legislature of each state should direct," urged "that this liberty would give more satisfaction, as the legislatures could thus accommodate the mode to the convenience and opinion of the people." Elliot, V, 223. Hamilton seems to take it for granted that the people would choose the electors. *Fed.*, No. 68. Jay expresses the same opinion. *Fed.*, No. 6. See also Elliot, VI, 145.

[3] *Federalist*, No. 68.

[4] Popular Government, p. 216.

rial constitution will, however, show that there is in reality almost no similarity between it and our electoral colleges. The latter form a numerous, ever-changing body, the members of which are chosen for a single election only, whereas the Imperial college was not only *small* and *inelastic*, but *permanent*. Further, the choice of the Emperor was *direct*, that of the President, constitutionally at least, is *indirect*. Had the choice of the President been left to the Governors of the states, as was suggested by Gerry,[1] they would have formed an electoral body somewhat resembling that of the Empire.

Although the plan of electing the President finds no precedent in the old world, we have already seen too much of the variety of constitutional development on this side of the Atlantic hastily to declare it new. In the constitution of Maryland (1776), we find an *almost exact counterpart* of the electoral college chosen in each of the states on the occasion of a presidential election. The senators were selected by a body of electors, chosen every five years by the inhabitants of the state *for this particular purpose and occasion*.[2]

The clause which provides that each state shall have a number of presidential electors equal to the number of representatives, together with the senators of that state, was the outcome of the previous plan of election by the national Congress. For August 24th, it was decided that the election should take place by *joint ballot* of the two houses,[3] which would have given each state the same proportional influence on the result that it now has.

It will be remembered that in Massachusetts, by the

[1] Elliot, V, 363.

[2] Johnston, who is, as far as I know, the only one who has devoted any attention to this subject, seems to have quite overlooked this fact, as he writes: "The [presidential] electoral system was almost the only feature of the Constitution not suggested by state experience." *New Princeton Review*, September, 1877. It did not, however, escape the men of the time, for Bowdoin, in the Massachusetts Convention, gave it as his opinion: "This method of choosing [the President] was probably taken from the manner of choosing senators under the constitution of Maryland." El. II, 128

[3] Elliot, V, 473.

constitution of 1780, the Governor was chosen by the people. In this constitution, as in that of the United States, the final choice in cases in which no candidate received a majority of the votes, was left to the members of the legislative body. The clause in the Federal Constitution appears to be a modification of that of Massachusetts, which served as a precedent.[1]

The Vice-president, who appears in the Convention for the first time September 4th,[2] bears a very striking resemblance to the lieutenant-governor of New York. The latter, by the constitution of 1777, was to be elected "in the same manner with the Governor," and "by virtue of his office be president of the senate, and, upon an equal division have a casting voice in their decisions, but no vote on any other occasion." "In case of the impeachment of the Governor, or his removal from office, death, resignation, or absence from the state," the lieutenant-governor was to exercise all the power and authority appertaining to the office of Governor until another was chosen, or the Governor, absent or impeached, returned or was acquitted. When the lieutenant-governor acted as Governor, or was unable to attend as president of the senate, the senators were to elect one of their own number to the office of president of the senate, which he exercised *pro hac vice*. This last clause corresponds, of course, to that in our Constitution providing for a president *pro tempore* of the Senate.[3]

The suggestion that the executive should have an absolute veto on all legislation, naturally met with little favor in the Convention, in spite of the influence of Wilson and Hamilton, who favored it on the ground that, like the veto of the English sovereign,[4] although seldom or never

[1] The latter read as follows: "If no person shall have a majority of votes, the house of representatives shall, by ballot, elect two out of four persons who had the highest number of votes, if so many shall have been voted for; but, if, otherwise, out of the number voted for; and make return to the senate of the two persons so elected; on which the senate shall proceed, by ballot, to elect one, who shall be gov ernor."

[2] Brearly's Report. Elliot, V, 506.

[3] Art. I, Sec. 3, ¶ 4.

[4] Elliot, V, 151.

used, it would serve to prevent rash legislation. A motion to give the executive a suspensive veto was negatived by all the states.[1] A motion of Gerry, of Massachusetts, June 4th, giving the executive the power to negative any legislative act which should not afterwards be passed by two-thirds of each branch of the national legislature, was passed by a vote of eight to two,[2] and this important point was once for all settled. Not only was this idea of a qualified veto taken directly from the constitutions of Massachusetts (1780) and New York (1777), but in the final draft the very words of the Massachusetts constitution frequently occur. This reads as follows: "No bill or resolve of the senate, or house of representatives, shall become a law, and have force as such, until it shall have been laid before the Governor for his revisal; and if he, upon such revision, approve thereof, he shall signify his approbation by signing the same. But if he have any objection to the passing of such bill or resolve, he shall return the same, together with his objections thereto, in writing, to the senate or house of representatives, in whichsoever the same shall have originated; who shall enter the objections sent down by the Governor, at large on their records, and proceed to reconsider the said bill or resolve. But if, after such reconsideration, two-thirds of the said senate or house of representatives shall, notwithstanding the said objections, agree to pass the same, it shall, together with the objections, be sent to the other branch of the legislature, where it shall also be reconsidered; and if approved by two-thirds of the members present, it shall have the force of a law. But in all such cases, the votes of both houses shall be determined by yeas and nays; and the names of the persons voting for or against the said bill or resolve shall be entered upon the public records of the commonwealth."[3] The constitution of New York (1777) provides for exactly

[1] Elliot, V, 155.
[2] Elliot, V. 155.
[3] Constitution of 1780, Pt. II, Ch. I, Sec. 1, Art. II.

the same revisionary power to be vested in a *council* for this sole purpose, to consist of the chancellor and judges of the supreme court, together with the Governor.[1]

The powers of the President of the United States, Mr. Freeman holds to be "essentially kingly," and "strictly royal, only when put into the hands of a republican magistrate they are necessarily limited in various ways."[2] Hamilton devotes a paper of the *Federalist*[3] to a comparison of the President, in respect to his power, with the King of Great Britain on the one hand, and the Governor of New York on the other. "The President is to be the commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States. He is to have power to grant reprieves and pardons for offenses against the United States, *except in case of impeachment;* to recommend to the consideration of Congress such measures as he shall judge necessary and expedient;[4] to convene on extraordinary occasions both houses of the legislature, or either of them, and in case of disagreement between them *with respect to the time of adjournment,* to adjourn them to such time as he shall think proper; to take care that the laws be faithfully executed;[5] and to commission all officers of the United States."[6] "In most of these particulars," Hamilton continues, "the power of the president will resemble equally that of the King of

[1] The "pocket veto" was prevented by a clause which appears only in part in the Federal Constitution. "In order to prevent any unnecessary delays," the New York constitution reads, "be it further ordained that if any bill shall not be returned by the council within ten days after it shall have been presented, the same shall be a law, unless the legislature shall, by their adjournment, render a return of the said bill impracticable, in which case the bill shall be returned on the first day of the meeting of the legislature, after the expiration of the said ten days." Art. 3, Sec. 2.

[2] History of Federal Government, 1, 313.

[3] No. 69.

[4] "It shall be the duty of the governor to inform the legislature, at every session, of the condition of the state, ... to recommend such matters to their consideration as shall appear to him to concern its good government, welfare and prosperity, ... to take care that the laws are faithfully executed." New York Constitution, 1777, Art. XIX.

[5] See preceding note.

[6] *Federalist*, No. 69.

Great Britain and of the Governor of New York." The Governors of the states in general had much the same powers and duties as the President. These powers were, no doubt, "essentially kingly" (and what powers are not ?), "limited in various ways;" but in determining just what powers should be entrusted to the new President, the delegates certainly had before their minds the familiar state executive rather than King George III, whose features Sir Henry Maine believes he so plainly detects in our President.[1]

IV.

Although of the very first importance in our system of government, the judiciary was not a subject which the delegates found it necessary long to discuss. With the exception of the mode of choosing the judges of the Supreme Court, the matter was quickly settled.

In making the judiciary a distinct branch of the government, the Convention only followed the lead of the majority of the states. Having spoken of the dangers and inconvenience of constituting either branch of the legislature a court of final appeal, Hamilton writes as follows: "These considerations teach us to applaud the wisdom of those states who have committed the judicial power, in the last resort, not to a part of the legislature, but to distinct and independent bodies of men. Contrary to the supposition of those who have represented the plan of the Convention, in this respect, as novel and unprecedented, it is but a copy of the constitutions of New Hampshire, Massachusetts, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia."[2] The want of judicial power was one of the crowning weaknesses of the Confederation.[3] The evils of the admixture of the judi-

[1] Popular Government, Essay No. 4.

[2] *Federalist*, No. 8. The majority of the State constitutions mention supreme or superior courts, but do not explicitly constitute them. The constitutions of Delaware and Maryland, however, do provide for a court of final appeal, and that of Georgia (1777, Sec. 40) for a final appeal to a special jury impanelled for the occasion.

[3] *Vide Federalist*, No. 22.

cial and executive functions in France at the time,[1] as well as the anomalies of the final court of appeal in England,[2] were known to the delegates, and no doubt served to impress lessons learned at home. Without debate, it was decided in committee of the whole that a national judiciary should be provided for, to consist of one supreme tribunal and inferior tribunals.[3] There was, however, some dissatisfaction expressed that a system of inferior courts should be forced upon the states, when the already existing courts would, it was maintained, answer the purpose as well or better. The sound judgment of Madison and others, who held that "an effective judiciary establishment commensurate to the legislative authority was essential,"[4] led them to see the inexpediency of limiting the number of distinctly federal courts to a single supreme tribunal. A compromise was proposed and accepted, by which it was left to the discretion of Congress to establish such inferior courts as it should see fit.[5]

Of the various classes of cases which fall within the jurisdiction of the United States Courts, one only need be considered here. It may, however, be remarked in passing, that in extending the federal judicial power to cases between two or more states, the Convention followed the example of the Articles of Confederation which, although establishing no courts, provided that the United States in Congress assembled should be the last resort on appeal in all disputes and differences between two or more states. Disputes concerning title to land under grants of different states were provided for in a similar manner.[6]

The department of the federal jurisdiction which we wish to consider here, depends on the clause of the Consti-

[3] Vide Pizard, *La France en* 1789, Ch. I.

[4] Vide May, Constitutional History of England, American Edition. I, 236.

[5] Elliot, V, 155.

[1] Elliot, V, 159.

[2] Elliot, V, 159.

[3] Art. IX. The *Reichskammergericht* of the Empire had, in these respects, a similar jurisdiction. Vide Schulte, *Histoire du droit et des institutions de l'Allemagne*, p. 370.

tution which provides that "the judicial power shall extend to all cases in law and equity arising under this Constitution [and] the laws of the United States." This is a corollary of the principle that the Constitution is the supreme law of the land.[1] In giving the federal tribunals the ultimate decision in cases of this class, the Convention established a system for preserving federal peace and harmony which is universally admired and extolled. The necessity and significance of this provision is excellently expressed by De Tocqueville. "Les Américains ne forment qu'un seul peuple, par rapport à leur gouvernement fédéral; mais, au milieu de ce peuple, on a laissé subsister des corps politiques dépendans du gouvernement national en quelques points, indépendans sur tous les autres; qui ont leur origine particulière, leurs doctrines propres et leurs moyens spèciaux d'agir. Confier l'execution des lois de l'Union aux tribunaux institués par ces corps politiques, c'était livrer la nation à des juges étrangers.

"Bien plus, chaque État n'est pas seulement un étranger par rapport à l'Union, c'est encore un adversaire de tous les jours, puisque la souveraineté de l'Union ne saurait perdre qu'au profit de celle des États.

"En faisant appliquer les lois de l'Union par les tribunaux des États particuliers, on livrait donc la nation, non-seulement à des juges étrangers, mais encore à des juges partiaux.

"D'ailleurs ce n'était pas leur caractère seul qui rendait les tribunaux des États incapables de servir dans un but national, c'était sûrtout leur nombre.

"Au moment où la contitution fédérale a été formée, il se trouvait déjà aux États-Unis treize cours de justice jugeant sans appel. On en compte vingt-quatre aujourd'hui.[2] Comment admettre qu'un État puisse subsister, lorsque ses lois fondamentales peuvent être interprétées et appliquées de

[1] Constitution of the United States, Art. VI, ¶ 2.
[2] 1834.

vingt-quatre manieres différentes à la fois! Un pareil système est aussi contraire à la raison qu'aux leçons de l'expérience."[1]

One of the striking peculiarities of our system which is apparently wholly missed by DeTocqueville[2] is its *flexibility*. There is no hard and fast line dividing the jurisdiction of the federal courts from that of the state courts. "The full purpose of the federal jurisdiction is subserved if the case, though heard first in the state court, may be removed at the option of the parties for final determination in the courts of the United States. The legislation of Congress has, therefore, left the parties at liberty, with few exceptions, to bring their suits in the state courts irrespective of the questions involved, but has made provision for protecting the federal authority by a transfer to the Federal Courts either before or after judgment of the cases to which the federal judicial power extends."[3]

A lesson from experience was, as has already been pointed out, to be found in the history of the government under the Articles of Confederation,[4] a lesson which came very near causing the Convention to rush to an opposite extreme by giving Congress the power to negative not only all the laws passed by the several states contravening, in its opinion, the Constitution, or any treaty subsisting under the authority of the Union,[5] but, as was advocated by some of the foremost members, even to annul any law of a state which it should judge to be improper.[6]

As the states may make laws as well as the federation, one of the chief services of a Constitution is to define, as nearly as may be, the bounds over which neither the central nor the state governments may pass. Thus, for

[1] *Democratie en Amerique*, I, 234.

[2] De Tocqueville himself confesses that "ce qu'un étranger comprend avec le plus de peine aux Etats-Unis, c'est l'organisation judiciare." "*Democratie en Am.*, I, 163.

[3] Cooley, Principles of Constitutional Law, p. 110.

[4] For an account of the encroachments of the States on the federal Government, see Elliot, V, 208.

[5] Elliot, V, 127.

[6] Elliot, V, 170.

example, our Constitution provides that in certain specified cases the central government alone may take legislative action; in other cases the state legislature may act so long as Congress abstains from exercising its power; and there is still another class of laws which neither Congress nor the state legislatures may make. This fact of a division in the exercise of sovereign powers lies at the foundation of every federal power. It is an inherent weakness of our form of government, and can only be recognized as such. The line of separation between the powers of the states and of the central government, no matter how carefully it may be traced, is so indistinct in parts as to be easily transgressed unintentionally, not to say willfully disregarded. It is then incumbent upon those who frame a constitution for a compound government, to provide for violations of this character both by the central power and the state governments. This problem of how to prevent dangerous jarring between the federal and state governments was one of those which the Convention of 1789 was obliged in some way to solve. To the wisdom of their solution no one would refuse to bear testimony.

From the history of the Confederation, the delegates had learned many useful and interesting facts about government. A consciousness of this, perhaps, accounts for the patronizing manner in which Randolph refers to the Articles of Confederation, drawn up ten years before, as the best product which could be expected of a time when the science of constitutions and confederacies was in its infancy.[1] Among other discoveries, the danger of encroachments by the states on the central government had been amply illustrated. The means of defense which it was proposed to put in the hands of the national Congress was, as we have seen, the power to negative the state laws when they were in opposition to the provisions

[1] "In speaking of the defects of the confederation, he [Randolph] professed a high respect for its authors, and considered them as having done all that patriots could do in the then infancy of the science of constitutions and confederacies." Elliot, V, 126.

of the Constitution. Pinckney moved, June 8th,[1] "that the national legislature should have authority to negative *all* laws they should judge to be improper." He urged "that such a universality of the power was indispensably necessary to render it effectual; that the states must be kept in due subordination to the nation; that if the states were left to act of themselves in any case, it would be impossible to defend the national prerogatives, however extensive they might be, on paper; that the acts of Congress had been defeated by this means; nor had foreign treaties escaped repeated violations; that this universal negative was, in fact, the corner stone of our efficient national government, the negative of the crown had been found beneficial, and the *states* are more one nation now than the *colonies* were then." This reference to the former power of veto possessed by the English government on all colonial legislation shows that the force of habit was behind this seemingly radical proposal. Madison seconded the motion. "He could not but regard an indefinite power to negative legislative acts of the states as absolutely necessary to a perfect system. Experience had evinced a constant tendency in the states to encroach on the federal authority; to violate national treaties; to infringe each other's rights and interests; to oppress the weaker party within their respective jurisdictions. A negative was the mildest expedient that could be devised for preventing these mischiefs. The existence of such a check would prevent attempts to commit them. Should no such precaution be engrafted, the only remedy would be an appeal to coercion."[2]

But in order to give the negative efficacy it must extend to all cases. "A discrimination would only be a fresh source of contention between the two authorities." Wilson[3] said, however novel the proposed power might appear,

[1] Elliot, V, 170.
[2] Elliot, V, 171; see, also, V, 321.
[3] Elliot, V, 172.

"the principle of it, when viewed with a close and steady eye," was right. On the other hand, it was urged that such an idea as this would never be acceded to. "It has never been suggested or conceived among the people," said Gerry. "No speculative projector—and there are enough of that character among us in politics as well as in other things—has in any pamphlet or newspaper thrown out the idea."[1] Lansing set forth the impracticability and danger of the plan as follows: "It is proposed that the general legislature shall have a negative on the laws of the states. Is it conceivable that there will be leisure for such a task? There will, on the most moderate calculation, be as many laws sent up from the states as there are days in the year. Will the members of the general legislature be competent judges? Will a gentleman from Georgia be a judge of the expediency of a law which is to operate in New Hampshire? Such a negative would be more injurious than that of Great Britain heretofore was."[2] Gouverneur Morris thought that the proposal of such a measure would disgust all the states. "A law that ought to be negatived will be set aside in the judiciary department, and if that security should fail, may be repealed by a national law."[3] Sherman pertinently urged the objection "Such a power involves a wrong principle, to wit: that a law of a state, contrary to the Articles of the Union, would, if not negatived, be valid and operative."[4]

To what extent the adoption of this clause would have modified the constitutional and political development of the Union would be a most interesting subject of speculation in the department of what-might-have-been. But, although it must be admitted that the Supreme Court has on several occasions proved unequal to its task, it may still be safely asserted that from the standpoint of to-day, Madison and Wilson were here misled, while Luther Mar-

[1] *Ibid.*, V, 172.
[2] *Ibid.*, V, 215.
[3] Elliot, V, 321. For Hamilton's ideas on this subject, see Elliot, V, 205.
[4] Elliot, V, 321.

tin, Lansing and others of a party to which we seldom look with gratitude, did good service on this occasion in working against the insertion in the Constitution of a clause at once superfluous and dangerous.

The action and scope of the Federal Courts is two-fold in two senses. I. In respect to law, they deal with the interpretation of the Constitution, on the one hand, and of the laws made by Congress, on the other. II. As a *constitutional* intermediary, the courts, in the first place, destroy the force of unconstitutional action on the part of Congress, and so protect the people, as well as the other branches of government, from the encroachment of the legislative body. Again, they keep the state governments from usurping powers which are either denied them or are vested by the Constitution solely in the central government. The Federal Courts, like other courts, decide cases according to the law of the land. The Constitution is a part of the law of the land. A so-called unconstitutional law is no more to be considered in deciding a case than the wishes or commands of an individual. The proceedings in Congress have failed simply from want of power to alter the condition of the body of the law upon which decisions must be based. Thus, the courts exercise no extraordinary power in the so-called decisions on constitutional matters. In all their activity they must determine what the law is, as well with regard to the common law as to the federal legislation. This complete assimilation of the laws of the Union to the body of the law of the land is the underlying principle of our federal judiciary.[1]

All direct and uncalled-for criticism of the action of states and of Congress by the judicial power is prevented by the method of adjudication, which Sir Henry Maine points out to be distinctly English. "No general proposition is laid down by the English tribunal unless it arises on the facts of the actual dispute submitted to it for adjudication."[2] The judges hold their offices during good

[1] See Marshall, Elliot, III, 553, and *Federalist*, No. 78.
[2] Popular Government, p. 219.

behavior—a plan, according to Hamilton, "conformable to the most approved of the state constitutions."[1]

The question of appointment of the judges caused much discussion. It was first decided that the Senate should have this power.[2] Mr. Gorham, dissatisfied with this plan, "suggested that the judges be appointed by the executive, with the advice and consent of the second branch, in the mode prescribed by the constitution of Massachusetts." This mode, which "had been ratified by the experience of a hundred and forty years,"[3] was the one ultimately adopted.

Sir Henry Maine speaks of the Supreme Court as a "virtually unique creation of the founders of the Constitution."[4] But it is, as we have seen, unique rather in position than in form. There were supreme courts in many of the States, forming a separate branch of government, with judges chosen for good behavior, and, in one state at least, in the manner prescribed by the Federal Constitution. Even in respect to constitutional importance we find a precedent in the state courts, for Gerry, in maintaining that "the judiciary would have a sufficient check against encroachments on their own department by their exposition of the laws, which involved a power of deciding on their constitutionality," reminded the Convention that "in some states the judges had actually set aside laws as being against the Constitution."[5]

"Le grand objet de la justice est de substituer l'idée du droit à celle de la violence; de placer des intermédiares entre le gouvernement et l'emploi de la force materielle."[6] As a lubricant to reduce to a minimum the friction between

[1] *Federalist*, No. 78.

[2] Elliot, V, 188.

[3] Elliot, V, 328 and 330. "All judicial officers . . . . shall be nominated and appointed by the governor, by and with the advice and consent of the council, and every such nomination shall be made by the governor." Cons. Mass, 1780, Pt. II, Ch. II, Sec. I, Art. IX.

[4] Popular Government, p. 217.

[5] Elliot, V, 151; III, 299 and 325.

[6] De Tocqueville, Democratie en Amerique, I, 233.

the parts of the complex machine of federal government, nothing has ever been devised so ingenious and so perfect as our system of supreme and inferior courts.[1]

V.

In its chief features, then, we find our Constitution to be a skillful synthesis of elements carefully selected from those entering into the composition of the then existing state governments. The Convention "was led astray by no theories of what *might* be good, but clave closely to what experience had demonstrated to *be* good."[2] The separation of powers, the form of the legislative assembly, the characteristics of the two branches, the representation and its periodic readjustment, the mode of passing laws, the institution of a single executive, the mode of choice by electors, the President's veto and his executive powers, the Vice-president, the regulations concerning impeachments, the judiciary, especially its form, the manner of appointing judges of the Supreme Court, and, it may be added, a number of minor points, such as the definition of treason, which it has seemed unnecessary to mention specifically—all find their archetypes in the constitutions of the states. On the other hand, the isolated position of the President, the flexibility of our system of Federal Courts and the peculiar position by which they exercise an all-important influence on the welfare of the Union, are original features. As a federation, our Union differs in almost every respect from those which preceded it, so much so that De Tocqueville declares it an essentially new thing with an old name. The principle of representation which was in 1787 confined "to a narrow corner of the British government" lies at the root of our Constitution, as it did of the state constitutions before it. The transcendent power and jurisdiction of parliament, a recognized principle of

[1] For a brilliant *resumé* of our judicial system, see De Tocqueville, Democratie, I, 251 *et seq.*

[2] Mr. J. R. Lowell, address before the N. Y. Reform Club, April 13th, 1888.

English constitutional law,[1] finds no analogy in the political ideas of this country, the "absolute despotic power, which must in all governments reside somewhere,"[2] resting with the people.

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[1] Vide Blackstone Commentaries, 1, 160; also Dicey, Law of the Constitution.
[2] James Wilson's Works, 1, 426-430.